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No. 76-354

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERTO VASQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 25-34) is reported at 534 F. 2d 1142.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1976. The petition for a writ of certiorari was not filed until September 7, 1976, and therefore is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's confession was the product of an unlawful arrest.

2. Whether the admission into evidence of an incriminating statement of a co-defendant was prejudicial error.

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner and a co-defendant, Chavez-Cortinas,[1] were convicted of having possessed marijuana with intent to distribute it and of having conspired to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner was sentenced to consecutive terms of five years' and three years' imprisonment, followed by special parole terms. The court of appeals affirmed (Pet. App. 25-34).

The pertinent facts are set forth in the opinion of the court of appeals (Pet. App. 26-29). At approximately 1:30 a.m. on February 26, 1975, Chavez-Cortinas and one Mario Moreno entered the United States from Mexico. They were driving a Ford van carrying a number of kilo bricks of marijuana into a sparsely populated area near Esperanza, Texas. Customs Patrol agents had been watching the crossing point and, with their automobile headlights turned off, they followed the van at a distance sufficient to avoid detection. The van passed two oncoming vehicles. At this point the vehicles stopped and began to make a U-turn in the road to follow the van. In order to avoid collision with these vehicles, the Customs Patrol officers switched on their automobile headlights, whereupon, apparently alerted, the occupants of the van accelerated from a speed of about 40 m.p.h. to 70 m.p.h. The Customs Patrol car pursued. Shortly

[1]Chavez-Cortinas has filed a separate petition for a writ of certiorari (No. 76-5189) to which we have submitted a separate response.

thereafter, the van failed to negotiate a curve in the road and rolled over several times. Moreno was killed in the crash; Chavez-Cortinas fled on foot but was subsequently tracked and apprehended.

The Customs agents, meanwhile, had stopped their car. The agents, in the illumination of the headlights of the overturned van, and in full uniform and with their own car flashing a rotating red light, attempted to wave the two following vehicles to a halt. Both trailing vehicles sped by without stopping, nearly hitting one of the agents. Petitioner was in one of these passing vehicles. The agent who had nearly been hit radioed the license plate number of petitioner's vehicle to all available law enforcement authorities, and the vehicle was stopped by El Paso police officers some sixty miles from the crash site.

Somewhat later, at the booking room of the El Paso Sheriff's Department, an officer of the Drug Enforcement Administration informed petitioner of his rights and started to interrogate him. Petitioner stated that he was willing to cooperate but preferred to speak with a local police officer attached to the D.E.A. Task Force. This local officer was summoned; after he advised petitioner of his rights, petitioner confessed in detail about his participation in the conspiracy. Petitioner told the officer that he had been the "money man" in the transactions; that while waiting for the marijuana to be brought across the border he had learned from a Mexican source that "someone had put the finger on the deal"; and that he had gone out that night in a vain attempt to warn the other participants not to bring the marijuana across the border.

Prior to trial, petitioner moved the court to suppress this post-arrest information. The district court denied

the motion, and the confession was admitted into evidence. Also received in evidence, over objection, was a post-arrest statement of a co-defendant, Ruiz-Aguilar, who admitted that he had been picked up by petitioner and that he "went down there to assist in the transportation of marijuana. They followed a certain routine—I can't recall the exact details, something to the effect that they turned their lights on or off, that he did not know who was going to bring the marijuana across and that all he was going to do was assist in the transportation of the marijuana" (Tr. 284, 292-293).

ARGUMENT

1. Petitioner contends that his confession was unlawfully admitted into evidence because it was the product of an illegal arrest and detention (Pet. 9-17). This contention is fully answered in the opinion of the court of appeals, which properly concluded that the arrest was supported by probable cause (Pet. App. 29-30):

> There can be no question but that law enforcement authorities had probable cause to arrest and detain appellant Vasquez. When officers Epps and Wright first observed the Dodge van in which appellant Vasquez was riding, the hour was late. See *United States* v. *Pearson*, 448 F. 2d 1207, 1212 (5 Cir. 1971). Moreover, the area around Farm Road 192 is sparsely populated. See *United States* v. *Maslanka*, 501 F. 2d 208, 212 (5 Cir. 1974). Officer Epps testified that it was highly unusual to see any traffic on Farm Road 192 in the early morning hours. Both Epps and Wright had worked in the area for over a year, and neither recognized the Ford van, the Dodge van, or the gold Toronado as local in origin. The events that transpired after the crash of the Ford van, of course, provided the weightiest support

> for the decision to arrest and detain appellant Vasquez. While flight from a law enforcement officer cannot support alone a determination of probable cause, flight can provide in appropriate circumstances the key ingredient justifying the decision of a law enforcement officer to take action. See *United States* v. *Jacquillon*, 469 F. 2d 380, 385 (5 Cir. 197.); *Johnson* v. *Middlebrooks*, 383 F. 2d 386 (5 Cir. 1967). We consider the events transpiring on Farm Road 192 appropriate to the application of this principle. We hold that the arrest and detention of appellant Vasquez was supported by probable cause; there was no illegal taint on appellant's subsequent confession to officer Contreras.

2. Petitioner's additional contention that the admission into evidence of the incriminating statement of Ruiz-Aguilar violated his rights under *Bruton* v. *United States*, 391 U.S. 123, is insubstantial. As the court of appeals held (Pet. App. 32), even assuming that the principle of *Bruton* was violated by the introduction of this testimony (but see *United States ex rel. Catanzaro* v. *Mancusi*, 404 F. 2d 296 (C.A. 2), certiorari denied, 397 U.S. 942), the error was harmless beyond a reasonable doubt in light of the other overwhelming evidence of petitioner's guilt, including his own detailed confession. Further review is not warranted.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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